



## **Governor's Domestic Violence Fatality Review Board:**

### **Domestic Violence and the Sixth Amendment**

*The following is a column by Robert T. Stephan, Chair of Governor Kathleen Sebelius' Domestic Violence Fatality Review Board:*

The most common complaint I hear from judges, prosecutors and law enforcement officers is that women who claim to have been battered do not appear to assist in the prosecution of their abuser. Estimates are that 80 to 90 percent of the time women recant or refuse to cooperate with the prosecution. The justice system needs to be knowledgeable as to the reasons this occurs.

Battered women refuse to appear because they fear for their safety and that of their children, the risk of losing their children, loss of financial support or employment, and re-victimization and trauma through the judicial process.

The United States Supreme Court recently issued an opinion in two cases dealing with the Confrontation Clause of the Sixth Amendment which provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The two cases involved a domestic battery complaint and the failure of the complainant to appear at trial. The decisions provide a window of opportunity to protect women in the judicial process but the fine lines make careful inspection of the circumstances of the complaint an absolute must for prosecutors.

Both cases revolved around the issue of whether or not the victims' statements were testimonial. A testimonial statement is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings. If a statement is testimonial, then the accused has the right to be confronted by the witness against him.

In one of the cases the victim (McCottry) made statements to a 911 emergency operator. McCottry told the 911 operator that the batterer had "jumped on her and used his fists" and she gave his name. When the police arrived, they saw injuries on her forearm and her face.

As to McCottry, the Supreme Court held that at least the initial interview conducted with a 911 emergency operator ordinarily is not designed primarily to establish or prove some past fact, but to describe current circumstances requiring police assistance. The

questions asked by the 911 operator were necessary to resolve the present emergency. As a result, McCottry's statements were not deemed testimonial and were admissible.

The other case decided by the Supreme Court held that the statements of the victim (Amy) were testimonial and must not be allowed at a trial.

Police responded to a domestic disturbance at the home of Herschel and Amy Hammon. Amy told the police nothing was the matter as did Herschel. After hearing Amy's account, the officer had her fill out and sign an affidavit as to how she was battered by Herschel. Herschel was charged with domestic battery and at the trial Amy did not appear. The Supreme Court said her statement should not be admitted because when it was given there was no ongoing emergency and the purpose of the interrogation was to establish or prove past events relevant to later criminal prosecution.

It should be noted if the court finds the victim did not appear at trial because she was intimidated by the batterer the Sixth Amendment right of confrontation has been waived and the victim's prior statement is admissible. The decisions are not a total win for domestic violence victims but the guidelines are fairly clear and should result in more justice for victims.